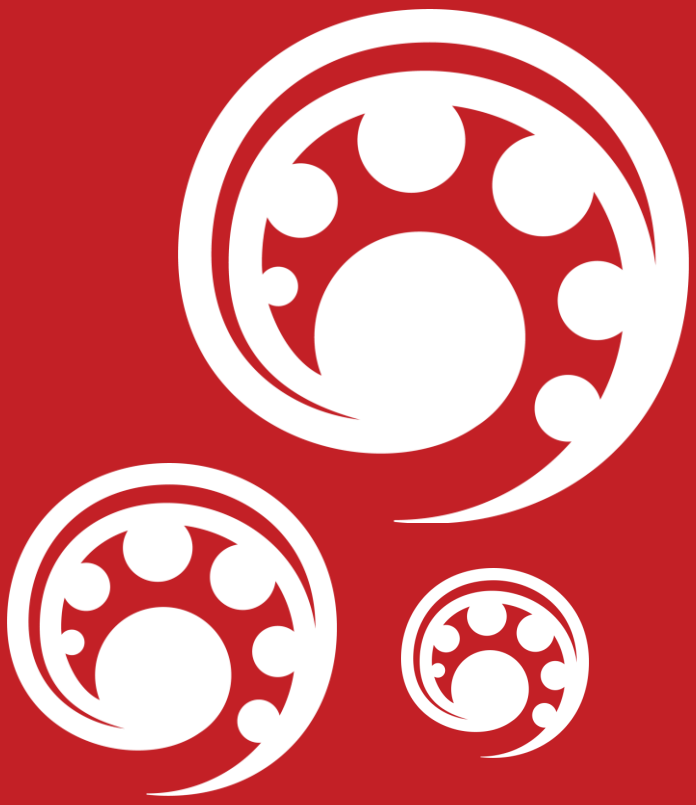

Submission to the Ministry of Justice: Adoption in Aotearoa New Zealand

Adoption Law Reform

MANAAKITIA Ā TĀTOU TAMARIKI
Children's Commissioner

About this publication

This is a submission to the Ministry of Justice to inform the review of adoption laws in Aotearoa New Zealand.

About the Office of the Children's Commissioner

Like most New Zealanders, we want every mokopuna* to grow up knowing they belong with a whānau that has what they need to live their best life.

The OCC represents 1.2 million people in Aotearoa New Zealand under the age of 18, who make up 23 per cent of the total population.

We advocate for their interests, ensure their rights are upheld, monitor places where mokopuna are detained, amplify their voices and ideas, and help government agencies to listen and act on them.

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*Note on definition of 'mokopuna'

Drawing from the wisdom of Te Ao Māori, we have adopted the term 'mokopuna' to describe *all* children and young people aged under 18 years of age.

This acknowledges the special status held by mokopuna in their families, whānau, hapū and iwi and is reflected in all we do. Referring to the children and young people we advocate for as mokopuna draws them closer to us and reminds us that who they are, and where they come from matters, at every stage of their life.

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Recommendations

1. Ensure the framework for the review of adoption law is underpinned by te Tiriti o Waitangi, mātauranga Māori, tikanga and te reo. This must include opportunities for Māori to determine participation and partnering across the reform process, legislation, policy and practice design.

2. Carry out a Child Impact Assessment (CIA) to inform the review. Ensure the rights of all mokopuna as articulated in the United Nations Convention on the Rights of the Child (the Children's Convention), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the United Nations Convention on the Rights of People with Disabilities (UNCRPD), are considered at every decision point and are woven through all legislation, policies and practices.

3. Facilitate consultation that includes targeted engagements with a diversity of groups, including (but not limited to), those with lived experience of adoption, tangata whenua, Pacific communities, disability communities and the academic community. Ensure the views gathered are considered and incorporated into the review process and into changes to legislation, policies and practices.

4. Incorporate the eight principles identified in this submission into the review process, including consultation processes and any changes to laws, policies and practices.

5. Ensure no further legislative infringements on the customary practice of whāngai occur and acknowledge it is for Māori to determine whether whāngai be legally recognised. Invite Māori communities to engage in kōrero about the design of this review at the earliest opportunity.

6. Invite communities of different ethnicities to engage in kōrero regarding the review of adoption laws, ensuring this is carried out in partnership with each community according to their cultural practices.

7. Address data and information gaps related to adoptions, ensuring data is disaggregated by age, ethnicity and disability. Collect and consider qualitative data from adoptees and whānau to ensure robust systems are put in place to respond to traumatic events that may occur for mokopuna and whānau.

8. Provide opportunities for consultation with Pacific communities and consider implications for customary practices, immigration pathways, and Aotearoa's relationships and responsibilities as a Pacific nation.

9. Consider the international precedent of ending international adoptions, and whether a road map to do this should be developed - informed by te Tiriti, the UNCRC, UNDRIP, UNCRPD, the Hague Convention and the eight principles in this submission.

10. Legislate separately for surrogacy, considering the eight principles in this submission and the rights of all parties involved.

11. Remove the management of adoption services and supports from the child protection system and ensure consistency across legislation related to the care of mokopuna.

12. Consider the options and implications of a full range of permanent care arrangements that may or may not require an Adoption Act, including amendments to COCA and other laws such as those that govern inheritance, immigration, and citizenship.

13. Invite the views of adoptees in considering what a formal apology would need to include as a form of redress for those negatively impacted by adoptions in Aotearoa.

Introduction

1. The current Adoption Act 1955 has not been reformed in 66 years. We applaud the Government for the reform process underway that recognises the need to look at adoption in the context of 2021 and beyond.
2. Adoption is an area that elicits significant debate and the Children's Commissioner has often been asked to advocate for reform. We are therefore encouraged by the opportunity to feed into this process.
3. We agree with the six objectives listed in the discussion document that have been created to shape the development of adoption law in Aotearoa. In particular, we support the need to align laws with te Tiriti o Waitangi (te Tiriti), the United Nations Convention on the Rights of the Child (the Children's Convention), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).
4. Rather than answer the specific questions in the discussion document, the OCC has prepared a high-level submission that takes a principled approach. It is crucial that high level principles are agreed on first, before looking at the legislation specifics. We recommend the adoption review process and consultation be guided by these principles.
5. Our submission has been informed by the views of people with specialist knowledge of adoption, some who have been adopted themselves or are parents of adopted mokopuna and hold roles as researchers and professionals. Others are researchers, social workers, legal experts and mokopuna rights advocates. We thank those who shared their views with us for this precious gift that has helped guide this submission.
6. The views shared with us are not a representative sample of the thousands of uniquely personal experiences of adoption over time. There is a need for the Government to ensure targeted consultation with people and communities who have knowledge, and lived experience, of adoption. These consultations must include Māori, Pacific, refugee and migrant communities and disabled people. We provided advice to the Ministry of Justice in April 2021 about how to engage mokopuna in this process.
7. We challenge the Government to be bold and to leave no stone unturned in considering all options in reviewing adoption laws. We believe this should include questioning whether or not an Adoption Act is required at all.

SECTION ONE: Foundations

8. Te Tiriti o Waitangi, the Children's Convention, and meaningful community consultation are three critical elements: pou, that we recommend underpin and infuse all aspects of the adoption law reform process and outcomes.
9. The identification of these three pou is a reflection of the OCC journey to understand the intersection between mokopuna rights and te Tiriti o Waitangi rights. They align with the process used, and the findings of, the OCC report Te Kuku o te Manawa.[1] This earlier work challenged the OCC to ensure that consultation, rights and te Tiriti are essential and inter-related components required to ensure the 'best interests' of mokopuna are centred.
10. These three pou reflect a commitment to the uniqueness of Aotearoa and to all mokopuna and whānau affected by adoption and permanent care arrangements – past, present, and future. Together they provide a lens with which to apply the principles outlined in section two.

1.1 Te Tiriti o Waitangi

11. Te Tiriti o Waitangi is our nation's founding rights document and the template for partnership and unity for Aotearoa New Zealand. In all forms of legislation and policy, Te Tiriti should be visible and give effect to it. This includes adhering to the rights of power sharing and authentic relationships.
12. Adoption law reform hits straight to the heart of the dysfunctional te Tiriti relationship between the Crown and tangata whenua. Thousands of mokopuna Māori who were adopted have been separated from their whakapapa and whenua. In order to not repeat this destructive history, te Tiriti needs to be woven through the laws, policies and practices that determine how mokopuna, who are temporarily or permanently separated from their biological parents, are cared for. This needs to happen in a way that holds both treaty partners equal and with integrity. It must include an overall statement defining the Crown's obligations on how they will give effect to te Tiriti.
13. Mokopuna Māori have rights as descendants of Te Tiriti o Waitangi to grow and prosper as Māori, in the fullness of all that means. These rights date back to 1840 and have been subsequently enshrined in domestic law and international agreements signed by Governments.
14. Mokopuna Māori have the right to be cared for by whānau, to retain an unbroken connection with their whakapapa, to live as tangata whenua, and to not be separated from their parents, siblings and whānau. If this is not

[1] Office of the Children's Commissioner (November, 2020) *Te Kuku o te Manawa.* Te-Kuku-O-Te-Manawa-Report-2-OCC.pdf

possible, then mokopuna Māori, and indeed all mokopuna, have the right to be cared for in a way that takes into account their ethnic, cultural, religious and linguistic background.

Recommendation one: Ensure the framework for the review of adoption law is underpinned by te Tiriti o Waitangi, mātauranga Māori, tikanga and te reo. This must include opportunities for Māori to determine participation and partnering across the reform process, legislation, policy and practice design.

1.2 The rights of mokopuna

15. All mokopuna are born with inherent rights. In addition to te Tiriti o Waitangi, these rights are articulated in a number of international agreements.
16. The United Nations Convention on the Rights of the Child (the Children's Convention), which New Zealand signed up to in 1993, stipulates that when it comes to adoption, the 'best interests of the child' shall be the paramount consideration (Articles 3 and 21). Wellbeing and 'best interests' paramountcy, has been visible across New Zealand's legislation since 1989. We support the intent of centring mokopuna within holistic understandings of their whānau, hapū, iwi and community.
17. The Convention recognises the right of mokopuna to protect and preserve their identity, including their family ties (Articles 7 and 8). Furthermore, Articles 9 and 10 state that mokopuna have a right to live with their family and whānau and to see them if they are separated from them. If removal from family care is unavoidable, Article 20 puts an obligation on States to take the ethnic, religious, cultural, and linguistic background of mokopuna into account when considering alternative care arrangements.
18. The right of Indigenous families or whānau and communities to retain shared responsibility for the upbringing of their mokopuna is further recognised in the Annex of the UNDRIP, which the New Zealand Government has committed to implementing since 2010. Article 7 states that Indigenous mokopuna have a right not to be forcibly removed from their families.
19. For mokopuna with disabilities, the UNCRPD sets out additional obligations that New Zealand signed up to in 2008. Article 23 states that mokopuna with disabilities have an equal right to family life, including any early and comprehensive information, services and support that they and their family and whānau need.

Recommendation two: Carry out a Child Impact Assessment (CIA) to inform the review. Ensure the rights of all mokopuna as articulated in the United Nations Convention on the Rights of the Child (the Children's Convention), the United Nations Declaration on

the Rights of Indigenous Peoples (UNDRIP) and the United Nations Convention on the Rights of People with Disabilities (UNCRPD), are considered at every decision point and are woven through all legislation, policies and practices.

1.3 Consultation

20. We emphasise the importance of consultation as essential in the next phase of the reform process. This should include adoptees at various ages recognising that they bring expert knowledge across their life course.
21. Consultation needs to occur across a diversity of groups including (but not limited to), tangata whenua, Pacific communities, disability communities and the academic community.
22. The review of adoption laws should draw on experiences of international jurisdictions and the examples of countries who have taken transformative approaches to adoption practices.
23. We previously advised the Ministry of Justice against engaging with mokopuna given the time frames presented to us at that time. If the Ministry of Justice has sufficient time and expertise to engage with mokopuna in the next phase, we support the development of an ethical mokopuna engagement framework to lead this.
24. The OCC has specialist knowledge on ethical engagement with mokopuna and would welcome any enquiries early on for advice and support. Mokopuna who have ongoing experience of living in alternative care arrangements will have particularly important insights useful to the law reform process. We reiterate that an ethical process ensuring the safety and wellbeing of mokopuna, and implemented by experts in engaging mokopuna, would be needed for any potential engagement.

Recommendation three: Facilitate consultation that includes targeted engagements with a diversity of groups, including (but not limited to), those with lived experience of adoption, tangata whenua, Pacific communities, disability communities and the academic community. Ensure the views gathered are considered and incorporated into the review process and into changes to legislation, policies and practices.

SECTION TWO: Principles

25. Building on the three foundations in section one, we recommend the following principles guide the process of centring mokopuna in their families, whānau, hapū, iwi and communities in the review of adoption law in Aotearoa.
26. While not referenced as a stand-alone principle, we acknowledge the wellbeing and best interests of mokopuna are central to adoption law reform. A holistic framing of 'best interests' of mokopuna is woven through the principles, especially in relation to their kinship and whakapapa connections.

2.1 Tino Rangatiratanga

27. Tino Rangatiratanga is the ability to have authority over and establish mechanisms to govern matters within cultural foundations.[2] This is defined as self determination, a rejection of assimilation and the enabling of systemic change that supports rangatiratanga. For Māori, this is expressed as 'by Māori, for Māori, of Māori in whānau, hapū, iwi and hāpori structures' with Māori leadership and control supporting Māori futures and wellbeing.
28. Tino Rangatiratanga is a secured right under te Tiriti o Waitangi which establishes Māori the right to determine, define and make decisions about mokopuna Māori as part of Article 2 and the protection of the kāinga.[3] The He Pāharakeke, he rito whakakīkinga whāruarua Wai 2915 Waitangi Tribunal claim articulated this as a responsibility of Government to both fund and support Māori aspirations and then step aside in regards to mokopuna Māori, handing back the authority to Māori.
29. UNDRIP reinforces this, stating that Indigenous peoples are entitled to self-determination, have a right to live as distinct peoples, the right to not be subjected to assimilation and the right to belong to their Indigenous nation.[4]
30. These rights can only be conferred if Māori are enabled to participate in the design of the legislation, policies and practices of future adoption law. Past adoption legislation has ommitted the inclusion of mokopuna, wider whānau and hapū in decision making. Grandparents are ommitted from decision making about their mokopuna, in policy and practices across Government and have been identified in research as wanting to be included and have a voice.[5]

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[2] Durie, M. (2011). *Nga tini whetu: Navigating Maori futures*. Huia Publishers.

[3] Waitangi Tribunal (April 2021) He Pāharakeke, He Rito Whakakīkinga Whāruarua.

[4] UNDRIP Articles 3, "Indigenous peoples have the right to self-determination…"; 7.2. "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group"; and 8.1, "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."

[5] Families Commission *Tūpuna - Ngā Kaitiaki Mokopuna. A Resource for Māori Grandparents* (Wellington, 2012).

31. Tino rangatiratanga includes tikanga and mātauranga practices and embraces decision making processes that are kaupapa Māori-led. This includes the ability for whānau, hapū and iwi to participate early in decision making processes, for example in Family Court proceedings.
32. Whāngai is an example of tino rangatiratanga in practice in a cultural context, led by Māori for Māori (see section 3.1).

2.2 Whakapapa

33. In addition to genealogical bonds, whakapapa – a fundamental cornerstone in te Ao Māori where everything is linked, both seen and unseen - includes connections to history, land, language and traditions.[6] All mokopuna hold whakapapa regardless of their ancestry origins or family migration. All mokopuna are gifted whakapapa as the essential characteristic of who they are, providing a template of how they fit into their kinship and society.[7]
34. Traditionally, whakapapa knowledge is shared through oriori, whakatauki, pūrākau, karakia and mōteatea pre and post birth and this continues across the lifecourse of a mokopuna. Māori mokopuna are born into this rich kinship system where their whakapapa is the source of their identity joined by whānau, hapū, iwi and whenua.
35. For mokopuna Māori, their rights to whakapapa and identity are protected in te Tiriti Article 2, where all steps need to be taken to safeguard whakapapa as it relates to 'taonga' and the 'kāinga'.
36. The Children's Convention outlines the best interests and rights for all mokopuna to: culture[8], identity, access to language[9], and education that supports the identity of mokopuna.[10] These are all elements of whakapapa as expressed in mātauranga Māori. They are equally relevant to all mokopuna, as rights that uphold wellbeing, connection and belonging in their communities. The state is required under Article 3 to provide for the best interests and

[6] "Whakapapa is the genealogical descent of all living things from the gods to the present time. The meaning of whakapapa is 'to lay one thing upon another' as, for example, to lay one generation upon another. Whakapapa is a basis for the organisation of knowledge in respect of the creation and development of all things."

Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991) p.173.

[7] Office of the Children's Commissioner *Te Kuku o te Manawa: Moe ararā! Haumanutia ngā moemoeā a ngā tūpuna mō te oranga o ngā tamariki, Report two of two* (OCC, Wellington, 2021) p.62.

[8] Articles 8, CRC, "State parties undertake to respect the right of the child to perserve his of her identity, including nationality, name and family relations as recognised by law without lawful interference"

[9] Article 17, CRC, State Party obligatons to cultural content of mass media (a) "Encourage the mass media to disseminate information and material of soical and cultural benefit to the child and in accordance with the spirit of article 29"

[10] Article 29.1 (c), CRC, educational rights of mokopuna to access education that supports their "...cultural identity, language and values... the country from which he or she may origniate, and for civilisations different from his or her own"

wellbeing of mokopuna, and under Article 8.2 to 'provide protection and appropriate assistance' where mokopuna are deprived of their identity.

37. Holding to the principle of whakapapa, the responsibility of relinquishing parental responsibilities is one that includes the participation of wider whakapapa connections to the mokopuna (including grandparents, aunties and uncles for example) to enable all possible options to be explored and the rights to whakapapa protected. This principle additionally ensures that mokopuna have ongoing connection to their lands, waters, resources and the communities that are part of their peoples' ancestry.

2.3 Whanaungatanga

38. Whanaungatanga is the embracing of whakapapa, centring kinship and relationships.[11] In the context of rights that mokopuna have to identity and belonging, whakapapa and relationships provide the foundation by which whanaungatanga is enabled to be practiced.
39. If mokopuna are central to adoption reform then whanaungatanga as expressed as relationships in the family, whānau, hapū, iwi and community need to be strengthened. This means accommodating decision making and support systems that wrap around any mokopuna who requires an alternative care arrangement.
40. Mokopuna have the right to access their rich networks of whānau, hapū and iwi. They have the right to culture and identity which is transmitted through whakapapa and the relationships that hold this knowledge.
41. Adequate support in decision making processes before, during and after alternative care arrangements are made, is core to supporting relationships to be positive and sustaining. After alternative care arrangements are made, the supporting relationships continue to be essential. Adoptive parents need support to do this because they do not always have the desire or skills to navigate the kinship relationships, the information sharing requirements, or the identity struggles, that can result from alternative parenting arrangements.

2.4 Collective Decision Making

42. Collective decision making in the context of alternative care arrangements is a process of allowing for a family and whānau response to decision making. It allows for a wider perspective to be taken into account in making decisions. Key to this is ensuring that decisions are not pre-determined and that the people facilitating the decision making process have the skills that ensure

[11] Office of the Children's Commissioner (November 2020) *Te Kuku o te Manawa*.

respectful communciation and space for everyone to participate. We acknowledge in complex situations such as rape and incest this process will require expert support - accessed through appropriate services.

43. Taking a collective decision making approach would support mokopuna to have adequate means to participate. While we know that most domestic adoptions in Aotearoa are of pēpi, we also know that there are adoptions (including intercountry adoptions), where mokopuna are of an age that they can directly have a say in decisions that affect them. We are cognisant of decision making being more than a "one off" at a point in time and that mokopuna will have changes throughout their lives that require adjustments. This will require the ability for those connected to a mokopuna to come back together to review and rethink whether past decisions are meeting present needs.
44. The Family Group Conference (FGC) model is celebrated internationally as a model of decision making that supports families and whānau. In our Te Kuku o te Manawa Reports we heard that the FGC process often fell short in practice, of providing families and whānau with a whānau-centred decision making process. Given the shortcomings of practice delivery, we suggest engaging with communities across a range of cultural contexts to identify best practice decision making processes and services. In our conversations with experts in developing this submission, people highlighted the Māori Health Authority, the Whānau Care Services and Whānau Ora as service examples where mokopuna hauora is viewed holistically and collective decision making is supported.
45. Collective decision making would provide a safer process for disabled parents who have been coerced into making decisions about alternative care for their mokopuna in the past. We encourage specifically considering the needs of disabled people in decision making processes to avoid perpetuating this discrmination.
46. More robust decision making that looks at mokopuna wellbeing as a whole and in the context of whānau wellbeing, will ensure mokopuna are better equipped to manage significant life transitions, and their rights to belong, and be supported in their identity, are met.

2.5 Transparency

47. Many adoptees in Aoteaora have written about the ethical implications and lived experiences of having no transparency of information of their whakapapa, their birth parents and their own life stories.[12] Despite open

[12] Newman, E. (2011). *Challenges of identity for Māori adoptees*. Australian Journal of Adoption*, 3*(2). Ahuriri-Driscoll, A. (2020). *Ka Tū te Whare, Ka Ora: the constructed and constructive identities of the Māori adoptee. Identity construction in the context of Māori adoptees' lived experiences*. Haenga-Collins, M., & Gibbs, A.

adoption practices in Aotearoa becoming more common in recent years, adoption law has developed under assumptions that *tabula rasa* (blank slate status) or 'clean break' theory enabled healthy attachment and a settled childhood.[13] Secrecy is a foundational principle of past Adoption law with resulting identity crisis and disconnection of mokopuna to their kinship ties, social structures and cultural rights.

48. The assimilation policies and secrecy of adoption resulted in huge numbers of mokopuna Māori being adopted by non-Māori families through closed adoptions, often through the child protection system and initially being made 'wards of the state'.
49. We can learn from mokopuna Māori experiences of non-Māori adoptions and the life course implications of a lack of transparency. Many adoptees have spoken of living dual identities, their adopted identity and their birth identity. Research shows that many adoptees struggle to locate their birth whānau. This can lead to a lack of sense of belonging and identity. When birth whānau have been found, adoptees have often struggled to build relationships or connect to their indigenous or cultural identities.
50. Transparency as a principle in reviewing adoption laws will help to ensure the life stories of mokopuna are available to them continuously throughout their life in a manner that is developmentally appropriate. This includes legally protecting the rights of a mokopuna to their information and opportunities to have access to their family, whānau, hapū, iwi and community.
51. Currently adoption legislation provides access for mokopuna to their original birth certificate only when they reach the age of 20 and the Human Assisted Reproductive Technology Register provides access for mokopuna to details of sperm, egg or embryo donors when they reach 18.
52. Transparency as a principle could remove age requirements and elevate mokopuna rights to allow for open access to information alongside appropriate support services as required. Consideration of these changes would be especially important in situations where the birth of a mokopuna has come about through the sexual abuse of a parent and expert support and safe processes are required.

2.6 Participation

53. The term 'participation' in the context of mokopuna has evolved over time and is different in different contexts. It can be described as a process in which

(2015). '*Walking between worlds': the experiences of New Zealand Māori cross-cultural adoptees*'. Adoption & Fostering*, 39*(1), 62-75.

[13] Haenga-Collins, M., & Gibbs, A. (2015). '*Walking between worlds': the experiences of New Zealand Māori cross-cultural adoptees*. Adoption & Fostering*, 39*(1), 62-75.

mokopuna are actively involved in, and have genuine influence over, decision making on matters that affect them. Making sure mokopuna have the right information, are able to engage in dialogue, have their views seriously considered and are involved in understanding the outcomes of their involvement are all part of participation as set out in Article 12 of the Children's Convention.[14]

54. There is no age limit on the right to be heard. All mokopuna have the right to participate – from the youngest age and in multiple ways. The right to participate acknowledges the diversity of abilities and experiences that impact on the way in which mokopuna are able to participate. For example, very young mokopuna can communicate their views through play or song. Disabled mokopuna may need specific supports to enable them to share their views and they should be given an opportunity to do so.
55. Adoption laws, policies and practices have thus far been designed for and by adults. A principled approach to adoption reform would ensure the views of mokopuna are heard and considered in decisions that affect them. This is in addition to the views of parents, families, whānau, hapū and communities (see section 2.4).
56. Mokopuna Māori, as tangata whenua, have a right under te Tiriti to be involved in decision making that affects them. Partnership is a key principle of te Tiriti and places an obligation on the Government to respect the tino rangatiratanga (the right of self-determination for Māori) to seek informed consent on issues of concern to Māori. How the partnership principle applies to mokopuna Māori specifically is yet to be fully explored. However, it follows that the Government's duty under te Tiriti to meaningfully involve Māori in decision making extends to ensuring mokopuna Māori are actively engaged and can genuinely influence decisions on matters that affect them.
57. UNDRIP recognises the right of Indigenous peoples, including mokopuna, to take part in decision making in matters affecting them. This includes the rights of Indigenous peoples to select who represents them and to have indigenous decision making processes respected. Article 18 states that Governments must seek Indigenous peoples' views and opinions and work together with them through their chosen representatives in order to gain their free, prior and informed consent before laws are passed or policies or programmes are put in place that will affect Indigenous peoples.
58. While we have not engaged with mokopuna directly about adoption to inform this submission, we have prepared advice on this for the Ministry of Justice. In

[14] General Comment No.12: the right of the child to be heard, UN Committee on the Rights of the Child, the Children's Convention (2009) https://www.refworld.org/docid/4ae562c52.html Article 12 of the Children's Convention which states: "(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

other engagements, mokopuna have told us time and again they want to be listened to and have their views heard and considered by decision makers. They also tell us about the importance of identity and belonging.[15]

59. The Child and Youth Wellbeing Strategy (legislated for under the Children Act 2014) supports the participation of mokopuna through being 'involved and empowered' and able to exercise their autonomy.[16]
60. Examples of legislation that upholds mokopuna participation include the Care of Children Act 2003 (COCA) where participation is usually provided through counsel for child. Currently there are no provisions for gaining the views of mokopuna in the Family Dispute Resolution Act 2013. We support changes underway to increase the mechanisms for mokopuna participation. The Oranga Tamariki Act 1989 (OT Act) provides clearer examples in s11 where 'reasonable opportunities to freely express their views' should be provided for, and support should be provided where there are difficulties in expressing their views. The review of adoption laws is an opportunity to include these examples of best practice in mokopuna participation.

2.7 Manaakitanga

61. Manaakitanga is the extending of aroha to others, also defined as 'generosity, caring for others and compassion'. Manaakitanga is an important concept to Māori securing supports that strengthen families and whānau.
62. Manaakitanga is demonstrated through multiple support systems from within the family or whānau, at hapū, iwi and community levels and, where required, in service provisions in the community.
63. Manaakitanga systems to support mokopuna already exist in communities. For example, Whānau Ora, kaupapa Māori organisations, counselling services, mental health support services and a wide range of non-government organisations currently support mokopuna, families and whānau. Extending these services to support families and whānau through early decision making about alternative care arrangements and complex and dysfunctional kinship relationships would provide mokopuna and their whanau with practical, holistic support. This will require well-funded specialist support services, particularly for complex situations such as family harm or sexual assault situations. These services should not be part of the services provided by Oranga Tamariki (refer to 3.7).

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[15] *What Makes a Good life?: Children and young people's views on wellbeing* (Wellington, 2019) Office of the Children's Commissioner and Oranga Tamariki.

[16] https://childyouthwellbeing.govt.nz/sites/default/files/2019-08/strategy-on-a-page-child-youth-wellbeing-Sept-2019.pdf. *"they have their voices, perspectives, and opinions listened to and taken into account"*

64. In our *What Makes a Good Life* report, mokopuna said they see themselves intrinsically linked to their family or whānau and see supports as crucial to family and whānau wellbeing and their relationships.[17]
65. The 2019 report into family justice reform, *Te Korowai Ture ā-Whānau*[18] provides a set of recommendations that highlight the need for support services to all family and whānau that engage in family court proceedings. We support the report's recommendation to fund services that adequately support mokopuna participation in Family Court proceedings, Te Ao Māori, the needs of diverse communities including disabled people, and the complexities where family harm occurs.
66. Extending this principle out across the lifecourse of mokopuna, the systems of manaakitanga would be available to help build a mokopuna life story appropriate to their age, and to support those parenting mokopuna. They would also provide ongoing support to manage a mokopuna connection to their culture, identity, family or whānau of birth.
67. There is a need to build on current support systems, particularly Māori systems of support, where formal service delivery is relatively recent and capacity remains impacted by the ongoing effects of colonisation. The stripping of the Māori economic base, in breach of te Tiriti requires a Government response that provides all opportunities and supports to build by Māori for Māori responses. This will require resourcing to Māori communities.

2.8 Non-discrimination

68. The current adoption law disadvantages certain people based on their age, sexual orientation, gender, marital status and/or disability. While this is in the context of parents and adoptive parents, the principle applies to mokopuna requiring alternative care arrangements in denying them the right to be cared for by adults based on discriminatory judgements. A principle of non-discrimination would ensure adults are assessed to care for mokopuna without prejudicing people based on these characteristics.
69. An equitable approach would safeguard disabled parents, who are reported to sometimes be pressured to give up their mokopuna for adoption, based on ableist views about their ability to parent and lack of support.[19]

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[17] *What Makes a Good life?: Children and young people's views on wellbeing* (Wellington, 2019) Office of the Children's Commissioner and Oranga Tamariki.

[18] *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Wellington, 2019), Ministry of Justice

[19] Fitzmaurice, L., Cleaver, K., & Keddell, E (2021). *The prevention project: Supporting whānau and reducing baby removals.*

Peter Boshier, (August, 2020). *He Take Kōhukihuki: A Matter of Urgency, Investigation Report into policies, practices and procedures for the removal of newborn pēpi by Oranga Tamariki, Ministry for Children*

Office of the Children's Commissioner (November, 2020) *Te Kuku o te Manawa.*

70. An equitable and inclusive approach would also protect and fulfil the rights of people from the rainbow community who are currently discriminated against in the Adoption Act.
71. A non-discriminatory approach to alternative care arrangements for mokopuna would fulfil Aotearoa's obligations to ensure the rights and responsibilities of equality and common citizenship of all New Zealanders under Te Tiriti o Waitangi (Article 3) and ensure Māori are free from any kind of discrimination in the exercise of their rights, in particular based on their Indigenous origin or identity under the UN Declaration on the Rights of Indigenous Peoples (Article 2).
72. A non-discrimination approach would align with Article 2 of the Children's Convention and Article 23 of the UNCRPD which aims to eliminate discrimination against persons with disabilities in matters relating to marriage, families, whānau, parenthood and relationships.
73. This principle aligns with the Child and Youth Wellbeing Strategy outcome area that mokopuna are accepted, respected, and connected, including feeling a sense of belonging, living free from racism and discrimination, having good relationships, and being connected to identity.
74. Mokopuna have told us they want to be accepted for who they are, supported in their identity, respected, listened to and believed in. We have heard about their experiences of discrimination and a sense of being let down, both by individuals and 'the system'. Taking a non-discriminatory approach to adoption contribute to mokopuna feeling accepted, respected, and connected and supported in their identity.

Recommendation four: Incorporate the eight principles identified in this submission into the review process, including consultation processes and any changes to laws, policies and practices.

SECTION THREE: Special Considerations

3.1 Whāngai

75. Whāngai literally means 'to feed and nourish'. It is the traditional customary system of 'the gift of love', sharing the care of mokopuna Māori through kinship ties. Whāngai dates back to pre-colonial Māori society and remains an active practice in many communities.
76. As noted in the discussion document, whāngai is not comparable to foster care or adoption as the principles that underly it are significantly different. A key principle is whanaungatanga based on relationships and the securing of bonds.
77. Colonisation and contemporary Māori social environments have continued to impact on and evolve the practice of whāngai, including through the dislocation from wider kinship relationships such as marae and hapū.
78. While we understand that whāngai is a practice that continues to work well in some whānau and communities, we also understand that whāngai is not always a viable option for Māori today.[20] The deterioration of whāngai is reiterated in research, as is the call for the practice to be protected and preserved.[21]
79. Whāngai provides valuable principles and understandings of the importance of kinship ties, the significance of viewing mokopuna in relation to their whānau, hapū and iwi and is an expression of rangatiratanga and a te Tiriti right.

Recommendation five: Ensure no further legislative infringements on the customary practice of whāngai occur and acknowledge it is for Māori to determine whether whāngai be legally recognised. Invite Māori communities to engage in kōrero about the design of this review at the earliest opportunity.

3.2 Customary 'adoptions'

80. There are many customary practices that occur in ethnic communities across Aotearoa and these will require consultation to ensure that legislation does not cut across these practices.

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[20] McRae, K, O., & Nikora, L. W. (2006). *Whāngai: Remembering, understanding and experiencing*. p.1

[21] Pitama, S.M. (1997). *The effects of traditional and non-traditional adoption practices on Māori mental health: Adoption and Healing. Proceedings of the Internatinoal Conference on Adoption and Healing.* Wellington: Uniprint.

81. We encourage the Government to engage in a diversity of consultations across Aotearoa to listen to communities and include their ideas into the adoption law reform process.
82. We do not have expertise in this area to enable us to comment further on this, other than to encourage and support wide consultation through multiethnic services, inclusive of refugee and migrant communities.

Recommendation six: Invite communities of different ethnicities to engage in kōrero regarding the review of adoption laws ensuring this is carried out in partnership with each community according to their cultural practices.

3.3 Non-customary adoptions and data

83. We understand from the data that is available that non-customary adoption practices have changed significantly in the past 20-30 years.
84. The large numbers of domestic transracial adoptions of the 1960s and 1970s, where mokopuna Māori were given to Pākeha families through assessments of parents being 'unfit' and assimilation agendas, have all but ended through adoption processes.[22]
85. The decline in non-customary adoptions over time is understood to be in part due to an increase of viable options for women including wider availability of state funded contraception and abortion services. While the domestic purposes benefit was introduced in 1973 it does not appear to have been a significant factor in the decrease. Adoption rates fell at the same time as a decrease in rates of babies being born outside of wedlock. This indicates that contraception was a strong influence on the correlation between the reduction in births and adoption numbers.[23] This all coincided with second wave feminism, social change and the normalisation of a wider range of accepted parenting arrangements.
86. From the information we have been given, there are currently about 20-40 non-customary domestic adoptions that occur each year in Aotearoa. One issue in the lack of data is that we don't know the circumstances of these adoptions, the ethnicities of the pēpi or the processes undertaken to identify their kin options. A better system to record data is needed. Data represents mokopuna, whānau and their life stories. These mokopuna are entitled to assurances that they are recorded for the purposes of better regulations and policy reviews.

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[22] McRae, K, O., & Nikora, L. W. (2006). *Whāngai: Remembering, understanding and experiencing*. Newman, E. (2013). *Challenges of identity for Māori adoptees*. Australian Journal of Adoption, 3(2).

[23] Palmer G.R. (1991). *Birth Mother: Adoption in New Zealand and the social control of women 1881-1985*. Univeristy of Canterbury.

87. We are concerned that the father's details are not always provided or known and this impacts on the opportunity of mokopuna to have paternal family and whānau included in decision making. There can be acceptable reasons for this which may include trauma around the conception event such as rape or incest. There is a need to balance the rights of mokopuna to their whakapapa, the rights of mothers (including to bodily autonomy), and the rights of fathers and paternal family or whānau members to be included in decision making regarding mokopuna.
88. While mothers, fathers and their families and whānau may be members of an ethnic group that has customary practices, it may not be their wish to participate in customary processes. The review of laws, policies and practices need to acknowledge the realities of communities, hold to principles that support cultural connections and protect whakapapa for mokopuna.
89. We believe that the principles in section two, particularly the principle of manaakitanga, provide for the complexities of need. These range from ensuring women with a lack of available support are enabled to make informed decisions (including those with disabilities), to ensuring that there are adequate trauma support responses for victims of abuse, and also that support is provided where dysfunction of kinship relationships exist.

Recommendation seven: Address data and information gaps related to adoptions, ensuring data is disaggregated by age, ethnicity and disability. Collect and consider qualitative data from adoptees and whānau to ensure robust systems are put in place to respond to traumatic events that may occur for mokopuna and whānau.

3.4 Pacific adoptions

90. Tangata Moana – those of Pacific descent – have longstanding whakapapa connections with Māori, with relationships informed by Te Tiriti.[24] Māori have established relationships with Pacific communities as part of Moana Nui a Kiwa and sharing migration whakapapa. Te Tiriti provides a framework of working with Pacific peoples in reviewing adoption laws.
91. In 2020, the majority of the 820 mokopuna adopted overseas and granted citizenship in Aotearoa were Pacific peoples. Currently s17 of the Adoption Act automatically recognises all adoptions internationally subject to subsection 2 and the providing of the required documentation. The review of adoption laws has the potential to impact disproportionally on Pacific communities and we

[24] STIR & NZPHA. (2021). *Briefing paper on the forthcoming National Action Plan against Racism*. Auckland, Aotearoa/New Zealand: STIR: Stop Institutional Racism, NZ Public Health Association and Auckland University of Technology.P.8

encourage wide consultation with Pacific communities to ensure that the government is maintaining New Zealand's commitments to Pacific nations.

92. Intercountry and overseas adoptions for Pacific peoples are an established pathway to migration. Reasons for adoption can include education and health opportunities for mokopuna. Immigration, citizenship and residency can flow from the legal recognition of adoption. We recommend any changes to adoption laws and policies consider impacts on pathways to migration and the wellbeing and rights of Pacific mokopuna and their aiga.
93. As outlined in the discussion document, customary adoptions and other informal care arrangements are common in Pacific cultures. One of the main reasons for sharing the care of mokopuna in Pacific cultures is to retain whakapapa.
94. There is a lack of data for Pacific adoptions - overseas, intercountry, domestic and customary. The review of adoption laws needs to address gaps in data and ensure that all steps have been taken to understand the scope of adoption both domestically and intercountry.
95. We encourage the Government to invite Pacific communities including aiga and Pacific churches to engage in discussion about the review of adoption laws. This includes the need to ensure the views of mokopuna are heard in ways that centre their rights and respect culture and identity.
96. The Ministry of Pacific Peoples, the Ministry of Foreign Affairs and Trade, DIA and MBIE should also be included in the consultation design with a focus on understanding the rights, interests and wellbeing of the Pacific community.

Recommendation eight: Provide opportunities for consultation with Pacific communities and consider implications for customary practices, immigration pathways, and Aotearoa's relationships and responsibilities as a Pacific nation.

3.5 International adoptions

97. We acknowledge the many and varied reasons why overseas and intercountry adoptions take place, some of which have been highlighted in the 'Pacific adoptions' section above.
98. In exceptional circumstances, there may be times that inter-country adoption is required to ensure mokopuna without kin-care in another country can be cared for by kin in Aotearoa. Our understanding is that to facilitate this, the Adoption Act is currently required.
99. Understanding these exceptions, we recommend the Ministry of Justice and other agencies reviewing the laws, policies and practices related to

international adoptions should focus on mokopuna rights (including Article 21 of the Children's Convention)[25] and apply the principles listed above.

100. As a nation we have grown our understanding of cultural differences by engaging with te Tiriti, tikanga, and mātauranga Māori and accept these as important for mokopuna Māori. All mokopuna have rights to their culture and identity and these rights are supported by our commitment as a country to the Children's Convention and UNDRIP.

101. International adoption (both intercountry and overseas adoptions) is subject to growing critique with assertions that it is not mokopuna centred and the process of removing mokopuna from their country of origin disconnects them from their family, whānau, their identity, language, culture, and place of belonging.

102. International adoption is increasingly restricted by 'rich' nations including Aotearoa. Aotearoa is not a 'sending' country under the Hague Convention but allows adoption in. The pattern of financially secure countries preventing mokopuna being adopted out of country has become normative and international adoption is now aligned with developing countries.

103. Issues with 'orphan tourism' have been recognised in some countries where mokopuna do have living parents and/or extended families who could be supported to care for them rather than be placed in orphanages or adopted. In some countries where orphanage tourism is common, this undermines government efforts to scale back institutionalisation of mokopuna and develop family-based alternatives.

104. The increasing demand for such tourism creates a supply chain where mokopuna are separated from their families and communities in order to meet the 'demand'. This can motivate families living in poverty to give up their mokopuna believing they will have a better quality of life elsewhere. It can also lead to child trafficking and situations where mokopuna can be recruited from their families sometimes by way of deceptive or coercive tactics.

105. Disabled mokopuna are overrepresented in international adoptions, the assumption being that they are not wanted and are in need of rescue. China provides an example of this as it only allows disabled mokopuna to be adopted out of country. The argument that it is in their 'best interests' to be adopted given comparable level of support in rich countries, is used to validate discrimination of disabled mokopuna.

106. As previously discussed, the issue of interpretations of 'best interests' results in mixed outcomes for mokopuna and is directed predominantly by adult needs or assessments. The Hague Convention as the safeguard against child trafficking relies on the interpretation of 'best interests' analysis and adequate placement options sought in the birth country of mokopuna.

[25] Article 21, CRC, "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall…"

107. Other local pathways to parenting now available (eg IVF and surrogacy), mean there is less demand for international adoption. This is reflected in the data. There were only 10 Hague Convention adoptions in 2019.
108. COVID-19 has had an impact on intercountry adoptions due to closed borders and changes in how assessments are made under the Hague Convention. Processes put in place to consider 'best interests' of mokopuna under the Hague Convention may be compromised due to COVID-19 restrictions. This includes travel restrictions which limit the ability to carry out assessments to determine whether mokopuna are deemed suitable for adoption.[26]
109. There are recent precedents in stopping international adoptions in the Netherlands in February 2021.[27] This is significant given the Netherlands' role in The Hague Convention.

Recommendation nine: Consider the international precedent of ending international adoptions, and whether a road map to do this should be developed - informed by te Tiriti, the UNCRC, UNDRIP, UNCRPD, the Hague Convention and the eight principles in this submission.

3.6 Surrogacy

110. In light of the separate consultation currently underway by the Law Commission regarding surrogacy, the OCC will submit on this topic separately. We support the proposed interim changes to the Adoption Act until a surrogacy law is enacted.
111. Our key message on this topic is that intending parents should have automated parenting rights if certain criteria are met. Currently in Aotearoa there is a requirement for intending parents to adopt even when the pēpi is genetically related to them. We believe this needs amending. This would benefit the pēpi and all parties by removing parental obligations currently placed on the surrogate and her partner, and conferring them on the intending parents, creating certainty for all involved.

Recommendation ten: Legislate separately for surrogacy considering the eight principles in this submission and the rights of all parties involved.

[26] https://journals.sagepub.com/doi/full/10.1177/0020872820940008

[27] https://www.reuters.com/article/us-netherlands-adoption-trafficking-idUSKBN1572A7

3.7 Oranga Tamariki

112. Currently Oranga Tamariki manages the assessment and portfolios of potential adoptive parents. From the information released by Oranga Tamariki from December 2019, they currently have 116 prospective adoptive parents on their books solely looking at adopting and another 157 who are either looking for a 'home for life' mokopuna or one through adoption.[28] These figures highlight the conflation of two separate systems for alternative care arrangements. 'Home for life' is a process introduced in the 2000s to secure permanency for mokopuna in need of care and protection. This process has been widely criticised by Māori, including in the Waitangi Tribunal Report on Oranga Tamariki. identified it as concerning in their final report.[29]

113. We believe it is not appropriate for adoption or adoption support services, regardless of what future legislation or practice looks like, to be part of the child protection system. There needs to be some oversight across 'home for life' permanency processes to ensure that these align with any new legislation. One of the challenges with regard to legislation that relates to caring for mokopuna, is that when one piece of legislation is updated, others fall behind. This is an issue across the Oranga Tamariki Act, the COCA Act and the Adoption Act. Consideration needs to occur to build practice consistencies across these Acts in order to meet the needs of mokopuna and ensure that one Act isn't utilised as a 'minimal requirement' to meet mokopuna rights.

Recommendation eleven: Remove the management of adoption services and supports from the child protection system and ensure consistency across legislation related to the care of mokopuna.

3.8 Amending other laws

114. We encourage the Ministry of Justice to carefully consider how other laws might be reviewed and amended to support a mokopuna-centred rights-based approach to permanent care arrangements that may or may not require an Adoption Act.

115. This would necessarily include an analysis of the Care of Children Act (COCA) which currently does not provide for a number of the principles outlined in this submission. The review of the Family Court has included

[28] https://www.orangatamariki.govt.nz/assets/Uploads/About-us/Report-and-releases/OIA-responses/Adoptive-parents-statistics.pdf

[29] Waitangi Tribunal (April 2021) He Pāharakeke, He Rito Whakakīkinga Whāruarua.

recommendations to amend COCA. We think this is an opportunity to include amendments that secure these principles.

116. The Care of Children Act could, for example, include provisions for collective decision making, transparency and contact provisions for families, whānau and hapū relationships. We support the reviews that have occurred that already support these concepts as essential to the wellbeing of mokopuna and encourage discussion about their inclusion.

117. Age limits related to permanency and guardianship arrangements are another key consideration. The implications of ending guardianship arrangements at 18 or 20 require careful examination, particularly with regard to consequences for the life course of mokopuna.

118. Inheritance law, permanency arrangements, and other laws related to immigration and citizenship will be affected by changes to the Adoption Act and therefore require consideration in this review.

119. The OCC has neither the required expertise in law, nor the capacity, to analyse all the issues and inevitable implications that require consideration. The identification of all the issues and consequences will need to be considered by the Ministry of Justice and we urge that adequate time is taken to ensure this is prioritised.

Recommendation twelve: Consider the options and implications of a full range of permanent care arrangements that may or may not require an Adoption Act, including amendments to COCA and other laws such as those that govern inheritance, immigration, and citizenship.

3.9 Redress

120. The adoptees that we talked with asked for the Government to formally make an apology to all adoptees and their whānau. They talked about the grief and harm caused by closed adoption, the forced process and the experiences of loss that are their felt through life course.

121. The Australian Government provided an apology to adoptees in 2013, starting a demand from women and adoptees in other nations to follow suit. In 2018 the Canadian senate recommended that the Federal Government formally apologise and this year Ireland issued a state apology.

122. We consider an apology, as an acknowledgement of the harm previously caused and critical to adoptees and their families and whānau, is overdue.

Recommendation thirteen: Invite the views of adoptees in considering what a formal apology would need to include, as a form of redress for those negatively impacted by adoptions in Aotearoa.

Concluding comments

123. The current Adoption Act is a relic of the past and we support the Government's efforts to reform laws relating to adoption. We urge full consultation across affected communities, information collection of data and expertise that is currently missing and a full scoping of the possibilities that other existing legislation (other than the Adoption Act) could hold all permanent care arrangements. This must include full analysis and understanding of all implications.

124. Te Tiriti needs to be the woven into the consultation, the legislation and policies and practices that follow. Invitations to Māori to engage in whatever way Māori decide has to be at the heart of next steps.

125. We consider a set of agreed principles is an important starting point for determining what a transformative approach to adoption law reform could look like. We have provided three pou and eight principles that we believe are important and encourage these to be tested through a consultation process to see if they are agreed in communities and fit for purpose.

126. We have provided a list of thirteen recommendations which we believe are important to consider in the reform process.

127. Pacific communities will potentially be significantly impacted through this reform and specific consultation needs to occur to ensure pathways to migration are not closed.

128. Between 1955 and 1995 there have been over 100,000 domestic adoptions in Aotearoa. This is a considerable number of affected adoptees and provides an opportunity to understand the life course implications in consultation directly with this group. It also provides the opportunity to listen to the harm that adoption has caused, and consider an appropriate apology as redress.